UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

AMERICAN ELECTRIC POWER COMPANY, INC.

Administrative Proceeding
File No. 3-11616

REPLY BRIEF
OF
AMERICAN ELECTRIC POWER COMPANY, INC.

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In accordance with the procedural schedule adopted in this proceeding and Commission Rule of Practice 340, 17 C.F.R. § 201.340 (2004), American Electric Power, Inc. ("AEP") hereby submits its Reply Brief to the initial briefs of American Public Power Association and National Rural Electric Cooperative Association (collectively, "Associations"), and Public Citizen, Inc. ("Public Citizen").

I. INTRODUCTION AND SUMMARY

AEP is replying to the Initial Briefs of the Associations and Public Citizen. Both submit extensive arguments but have virtually no evidentiary support for them. Their briefs consist primarily of lengthy policy arguments and unsupported factual assertions by counsel, interspersed with inaccurate references to AEP testimony and citations to materials outside the record. These arguments do not substitute for evidence, particularly since the Commission decided to conduct this case in order to build a more substantial evidentiary record. In any event, the significant evidence in the record—none of which was rebutted at hearing—refutes all of their contentions.

Public Citizen barely addresses the issues that were set for hearing. It takes the position, unsupported by any law, that the Commission has an obligation on remand to consider the entire Merger application *de novo*; therefore, most of its brief addresses extraneous matters. Not only is Public Citizen's exceptional proposition not supported by any law, it ignores the fact that the bulk of the Commission's earlier findings approving the Merger either were specifically upheld by the D.C. Circuit or never challenged on appeal at all. Moreover, the Commission's order setting this case for hearing properly established the hearing scope, and that order limited the hearing to two issues.

Both the Associations and Public Citizen emphasize that AEP bears the burden of proof in this proceeding. AEP does not disagree that it bears the initial burden, but once AEP presented substantial evidence in support of its case, the evidentiary burden shifted to the other parties. Here, neither the Associations nor Public Citizen even attempted to meet their own evidentiary burden to respond to AEP's case.

Both participants attempt also attempt to attach significance to the Court's decision to vacate the Commission's prior approval of the Merger. This is pretense. It is normal practice for courts to vacate administrative decisions when they find that the agency made insufficient factual findings. Indeed, we have identified no decision suggesting that *vacatur* increases any party's—or the agency's—burden on remand. The law is clear: The Commission has full discretion on remand to validate its decision with new evidence and factual findings.

In the end, the briefs of both the Associations and Public Citizen present no substantive reason why the Merger should not be approved, and merely confirm that the overwhelming evidence in the record supports AEP's position on the issues.

II. REPLY TO THE ASSOCIATIONS' INITIAL BRIEF

AEP has organized its response to the Associations' Initial Brief using the three major headings in the Argument section of that brief. Thus, AEP responds first to the arguments in Section I, entitled "AEP bears the burden of proof to show why it should not be ordered to divest CSW." Associations' Br. at 14. Second, AEP responds to the arguments presented in the section II, entitled "AEP does not satisfy PUHCA's interconnection requirement." *Id.* at 20. Third, AEP responds to the arguments presented in Section III, entitled "The merged company is not confined to a single area or region." *Id.* at 35.

A. Burden of Proof (Associations' Brief at 14-20)

1. The Associations contend that there is a "statutory presumption . . . against mergers of already-large holding companies." Associations' Br. at 14. They provide no support for this proposition in either the Act's language or the case law. The Act requires the Commission to review proposed mergers against specific statutory standards, which are set forth in Section 10. *See* 15 U.S.C. § 79j. Section 10 does not state a presumption against mergers, and the Commission has never interpreted Section 10 to establish such a presumption. The Commission correctly reviewed the Merger under the statutory standards, and the Court affirmed the Commission in all but two respects. *See National Rural Elec. Coop. Ass'n v. SEC*, 276 F.3d 609, 614-19 (D.C. Cir. 2002) ("*NRECA*"). Thus, as stated in the Commission's order setting this case for hearing, the sole purpose of this proceeding is to review these remaining two elements of the statutory standard based on an evidentiary record, and no "presumptions" should apply. *See American Electric Power Co., Inc.*, Holding Co. Act Rel. No. 35-27886, 2004 SEC LEXIS 1952 (Aug. 30, 2004) ("*Hearing Order*").

2. The Associations argue that AEP has the "burden of proof" in this case. Associations' Br. at 19. AEP acknowledges that, as the proponent of an order approving the Merger, it has the

initial burden of proof, which means, according to the relevant law, that AEP has the burden of coming forward with a *prima facie* case to support its position, at which time the evidentiary burden shifts to AEP's opponents. *E.g.*, *Colorado Interstate Gas Co. v. FERC*, 904 F.2d 1456, 1459 (10th Cir. 1990) ("When [an agency] initiates [a proceeding], it bears the burden of proving that the existing rates are un[lawful] and that those it orders . . . are [lawful]. Once it makes these *prima facie* showings, the burden shifts to the opposing party to rebut them."); *accord Frey v. Dep't of Labor*, 359 F.3d 1355, 1360 (Fed. Cir. 2004); *BSP Trans, Inc. v. Dep't of Labor*, 160 F.3d 38 (1st Cir. 1998); *Vercillo v. CFTC*, 147 F.3d 548, 554 (7th Cir. 1998); *Zaitona v. INS*, 9 F.3d 432, 434 (6th Cir. 1993); *Kraft, Inc. v. FTC*, 970 F.2d 311, 327 (7th Cir. 1992); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 368 (D.C. Cir. 1989); *First Nat'l Bank of Bellaire v. Comp. of Currency,* 697 F.2d 674, 683 (5th Cir. 1983).[1]

AEP presented substantial evidence from three witnesses in support of its position on the two issues that were set for hearing, which more than satisfied its obligation to make a *prima facie* showing. The Associations and Public Citizen may disagree with AEP's evidence and conclusions, but once AEP presented its case, the evidentiary burden shifted to them to present substantial evidence to rebut this *prima facie* case. The Associations presented no evidence whatsoever, and have therefore failed to meet their burden under applicable law. *See, e.g.*, *BSP Trans*, 160 F.3d at 46; *Colorado Interstate*, 904 F.2d at 1459. Indeed, Public Citizen's evidence was scant at best, and its Initial Brief makes clear that this evidence is unrelated to the two issues that were set for hearing. Accordingly, the Associations and Public Citizen failed to present any

[1] *See also NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965) ("'That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.'" (quoting APA legislative history)).

evidence to support the factual findings they seek in this proceeding. *See, e.g.*, *Kraft*, 970 F.2d at 327; *Colorado Interstate*, 904 F.2d at 1459; *Transwestern Pipeline Co. v. FERC*, 820 F.2d 733, 746 (5th Cir. 1987).

3. Having presented no evidence for the record on the issues, the Associations resort to mudslinging. They devote several pages of their Initial Brief to repeating allegations concerning reporting of natural gas trades by an AEP subsidiary that have been public for several years (the only thing new is the final settlement of these claims), and then attempt to link those allegations to this proceeding by suggesting that they somehow might affect the viability of AEP's analysis of its transmission needs between AEP East and AEP West. *See* Associations' Br. at 15-18. The Associations' arguments are irrelevant.

First, the record contains no evidence to support the Associations' claims. If the Associations believed there was a link between these allegations and any evidence presented by AEP, they had an obligation to present evidence to support it. As counsel for the Associations stated several times during the hearing, a party must live with the case it brings to the courthouse. *See, e.g.*, Tr. 24, 26, 27-28, 52, 56. In this instance, the Associations brought no case at all. As for the article attached to the Associations' Initial Brief, it is not record evidence and cannot be considered by the Hearing Officer.[2]

Moreover, the claims the Associations' make based on the article are spurious. There is no relationship between the very limited natural gas reporting violations that were recently

[2] The Associations do not even ask that the record be reopened to admit this article. AEP would have strongly opposed such a request since there was no reason whatsoever for this matter not to have been explored by the Associations on a timely basis at the hearing, giving AEP a fair chance to respond in the record. Indeed, had the record been reopened, AEP would have presented evidence of the obvious lack of impact of these allegations on the proceedings, including the limited time period of the reporting violations and the immediate action AEP took against the four employees whose rogue conduct led to the inquiries.

settled and any issue in this proceeding. AEP's pre-merger analysis of its transmission needs between the east and west systems was based on its projection of the differential marginal cost of electricity in the AEP east and west zones. The testimony shows that AEP's experience since the Merger—including several years of operation after the alleged reporting improprieties ended in 2002—have confirmed that AEP's analysis was correct. AEP Exhibit No. 5 at 15-17. That is the only evidence in the record on this issue. If the Associations had any credible basis for claiming that these allegations affected Mr. Baker's conclusions, they could and should have presented evidence to support the claim. Instead, they have chosen to suggest, inaccurately, that these allegations were made public for the first time since the record closed, and then relied on supposition and innuendo to make their argument.

4. The Associations argue that, because the Commission's prior order was vacated, the Court of Appeals must have considered it unlikely that the Commission would be able to find that the Merger satisfies the requirements of the Act. Associations' Br. at 18. The Associations' claim is inconsistent with the D.C. Circuit's ruling, which remanded the case only because of insufficient evidence in the record and insufficient Commission explanation of the basis for its decision. *See NRECA*, 276 F.3d at 614-19. The Commission thus established this proceeding, consistent with the Court's opinion, to take additional evidence and consider the Court's concerns on two issues in light of that evidence. *See Hearing Order*, 2004 SEC LEXIS 1952 at *4 ("We believe further supplementation of the record is required for us to address the issues identified in the Court's opinion . . . ."). The Associations, of course, have presented no evidence.

The Associations' intimation that the Court's *vacatur* order somehow created an elevated burden of proof that the Commission must satisfy on remand is also at odds with the law.

Appellate courts typically vacate administrative decisions when there is insufficient evidence in the record to support the agency's order. *See, e.g., Advocates for Highway & Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288, 1289 (D.C. Cir. 1994) ("We vacate and remand the rule because the agency lacked the data necessary to support [it]."); *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575, 586-87 (5th Cir. 2004) (same); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 569-70 (D.C. Cir. 2004) (same), *cert. denied*, 125 S. Ct. 313 (2004); *Dia v. Ashcroft*, 353 F.3d 228, 260-61 (3d Cir. 2003) (same); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001) (same). As the D.C. Circuit has explained, "When we hold that an agency has not provided an adequate explanation for its action, the 'practice of the court is ordinarily to vacate the [action].'" *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1083 (D.C. Cir. 1997) (citation omitted); *see also Illinois Public Telecomms. Ass'n v. FCC*, 123 F.3d 693 (D.C. Cir. 1997); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1173 (D.C. Cir. 1994); *Checkosky v. SEC*, 23 F.3d 452, 184 & n.35 (D.C. Cir. 1994) (Randolph, J., writing separately). Thus, it is hornbook law that "vacating an order 'does not foreclose[] the possibility that the Commission may develop a convincing rationale for re-adopting the same [order] on remand.'" *Radio Television*, 130 F.3d at 1083 (citation omitted).[3]

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[3] Indeed, a court's decision to vacate where it has found insufficient evidence or explanation to support the agency simply cannot be read as a prejudgment on the remand proceeding, because the court's task is simply to identify the legal error in the agency's action. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). "[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1972); *see also United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966); *NLRB v. Enterprise Ass'n of Steam*, 429 U.S. 507, 521-22 & n.9 (1977); *Global Van Lines, Inc. v. ICC*, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986). This is precisely what has happened here. Having decided there were deficiencies in the Commission's original order, the Court remanded for further proceedings, and through those proceedings, AEP has presented evidence that the Commission can use in "exercis[ing] its administrative discretion in deciding how . . . its prior decision should be modified in light of such evidence." *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S.

B. The Interconnection Requirement (Associations' Brief at 20-34)

1. The Associations note that AEP's agreement for transmission service on the Contract Path is not in the record. Associations' Br. at 21-22. This agreement, however, is a filed rate schedule and publicly available at the FERC. Indeed, FERC is statutorily obligated to post for public inspection and make available to the public all rate schedules subject to its jurisdiction. 16 U.S.C. §824d(c); *see also* 18 C.F.R. §35.1(a) & 35.2(d) (2004). Had the agreement contained terms that contradicted Mr. Baker's testimony, the Associations had ample opportunity to present such evidence. In any case, the Associations' position is disingenuous.

The Associations are represented in this case by experienced FERC counsel. Counsel should know that transmission agreements under the FERC OATT are short-form agreements that contain virtually no substantive terms and conditions. *See* Order No. 888-A at 31,048. The substantive provisions are in the FERC OATT itself, which is part of FERC Order No. 888.[4] Accordingly, there was no need for AEP to include the agreement in the record.

Indeed, Mr. Baker's testimony provided a detailed description of the terms and conditions of the transmission agreement that establishes the Contract Path, and that testimony has not been rebutted or challenged. AEP Exhibit No. 5 at 17-20, 34-35. Accordingly, the Hearing Officer has no reason to question Mr. Baker's description of the transaction or require the submittal of further evidence.

326, 333 (1976).

[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

2. The Associations incorrectly claim that, under the FERC OATT, AEP can only redirect transmission service on a non-firm basis. Mr. Baker's unrebutted testimony proves otherwise. AEP Exhibit No. 5 at 10-13. Mr. Baker testified that the flow of transmission reservations such as the Contract Path can be redirected "on either a firm or non-firm basis at no additional cost." *Id.* at 13. This is the only record evidence on the subject.

Second, the relevant provisions of the FERC OATT are part of FERC Order No. 888 and therefore can be found in the Appendix of orders and decisions that AEP circulated to the Hearing Officer and the parties at the end of the proceeding at the Hearing Officer's request. Pursuant to Section 22.2 of the FERC OATT, firm transmission service can be redirected on a firm basis. Several FERC decisions confirm this right. *See MidAmerican Energy Co. v. Mid-Continent Area Power Pool*, 104 FERC ¶ 61,212, at P 17 (2003); *Dynegy Power Marketing, Inc. v. Southwest Power Pool, Inc.*, 96 FERC ¶ 61,275, at 62,047 (2001), *order on clarification*, 97 FERC ¶ 61,340 (2001), *order on reh'g*, 99 FERC ¶ 61,054 (2002). In addition, AEP has the right to redirect service on a non-firm basis. *See* FERC OATT § 22.1.

3. The Associations contend that AEP has not reserved firm transmission service from west to east, and therefore any service it acquires in this direction is subject to availability. Associations' Br. at 24. The record shows that AEP studied the availability of transmission capacity from west to east, together with the cost of acquiring a second firm reservation in this direction, and concluded that it would be imprudent to bear the very substantial additional cost of acquiring a second firm transmission reservation in light of the expected use and availability of west-to-east service under the FERC OATT. AEP Exhibit No. 5 at 16. The experience since the Merger's closing has borne out AEP's projections. *Id.* at 15. Economics have dictated a flow of power that is overwhelmingly in the east-to-west direction, and transmission has been available

for the west-to-east transactions—still a substantial volume—when it has been economical to move power in that direction. The Associations presented no contrary evidence, and the record contains none. The uncontroverted record evidence therefore supports a finding that AEP has sufficient transmission service to integrate the Combined System from west to east.

Moreover, as AEP stated in its Initial Brief, neither the statute nor any Commission or court decision—including the Court's decision in this case—requires AEP to recklessly spend ratepayers' money to reserve additional firm transmission capacity from west to east, particularly in light of the availability of transmission service under the FERC open access regime. *See* AEP Initial Br. at 10-14. The uncontested evidence is that AEP has access to this transmission when it needs it.

4. The Associations contend that when the Court rejected the use of a "unidirectional' Contract Path, it really meant that AEP must reserve transmission service on a firm basis in both directions. Associations' Br. at 28. In essence, the Associations are arguing that the Court has already held that the Commission wrongly decided not only this case, but all of the recent cases cited by AEP in its Initial Brief in which such approval was granted despite the merging utilities not acquiring a firm transmission contract path in both directions.[5] There are several reasons why this extreme position should be rejected.

First, this is not what the Court said. The Court was expressly concerned about "restrict[ion] to unidirectional flow of power from one half to the other." *NRECA*, 276 F.3d at 615. AEP has addressed this concern by showing that it has the right and the capability to move power in both directions, and that it has done so consistently since the Merger without acquiring

[5] *See CP&L Energy, Inc.*, Holding Co. Act Rel. No. 27284, 54 S.E.C. 996 (Nov. 27, 2000); *Energy East Corp.*, Holding Co. Act Rel. No. 27224 (Aug. 31, 2000); *Exelon Corp.*, Holding Co. Act Rel. No. 27256 (Oct. 19, 2000); *Exelon Corp.*, Holding Co. Act Rel. No. 27904 (Oct. 28, 2004); *New Century Energies*, Holding Co. Act Rel. No. 27212 (Aug. 16, 2000).

additional transmission rights. AEP Exhibit No. 5 at 10-11, 16-17. The words of the Court's decision have a plain meaning, and based on that meaning AEP's evidence has addressed the Court's concern.

Second, the Court did not have before it the Commission's rationale in the cases discussed above, or the substantial evidence in this record about the characteristics of the Contract Path. The Court did not address the substantial rights that exist for transmission customers under FERC Order No. 888 and the OATT, which are intended to provide "comparability" between the owners and purchasers of transmission rights. *See* Order No. 888 at 31,647. The opinion also did not address the facts, not then established in the record, that firm transmission service can be redirected on a firm or non-firm basis under the FERC OATT, and that because of Order No. 888, AEP has a right to acquire transmission capacity from others whenever it is available on a non-discriminatory basis, and if it is not available can request that new transmission capacity be constructed for its use. The Court made no mention of the fact that AEP had performed a study to determine its transmission needs, as well as the availability of transmission from west-to-east before acquiring the Contract Path. And, most importantly, the Court did not have before it the record of AEP's experience since the Merger, which has confirmed that the Contract Path has been consistently used for two-way transfers of power and is fully adequate for integration purposes. These facts directly resolve any concern the Court may have had regarding AEP's initial projections about sending power west to east.[6]

Third, the Associations' interpretation of the interconnection requirement would force

[6] The factual portion of the Court's opinion simply observed that "AEP and CSW apparently expect that there will be fewer 'opportunities to transfer energy economically' from west to east than from east to west, but when and if such opportunities arise, New AEP proposes to make use of its rights under pre-existing transmission service agreements." *NRECA*, 276 F.3d at 612. Of course, as explained above, the Commission now has significant evidence that AEP is *in fact* fully capable of moving power in both directions.

holding companies to spend money imprudently, and increasing customers' costs unnecessarily, in order to satisfy their version of the Act's requirements. This is a nonsensical interpretation of a statute that was enacted to protect the interests of electric consumers.[7] No provision of the Act can be read to suggest that Congress intended holding companies to plan and operate their systems inefficiently in order to satisfy the interconnection, or any other, requirement. Rather, the integration requirement of Section 2(a)(29) focuses on whether the system "under *normal conditions* may be economically operated as a single interconnected and coordinated system." (Emphasis added). AEP's evidence demonstrates that since it merged in June 2000, the Combined System, using the Contract Path, meets this standard. AEP Exhibit No. 5, at 9-11, 15-16, 18-19.

5. The Associations contend that AEP has "left the Commission almost in the dark" about its rights to transmission service after June 2005. Associations' Br. at 24. However, the Court already affirmed the Commission on this issue of a post-2005 Contract Path, and it was not set for hearing. The Court held that it was "unpersuaded by Petitioners' characterization of the contract path as too . . . 'tentative.'" *NRECA*, 276 F.3d at 614.[8] In rejecting this challenge to the term of the Contract Path, the Court pointed to the Commission's statement that it would require AEP to divest one of its systems if it allowed the Contract Path to expire without obtaining an alternative means of interconnection. *Id.* at 615. This issue is therefore not before the Hearing

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[7] It is worth noting that neither the Associations nor Public Citizen has presented one iota of evidence that any electric consumer anywhere, at anytime, or in any fashion has been harmed by the Merger. In fact, the Commission found that the Merger would produce over $2 billion in benefits for electric consumers, and this finding was upheld by the Court over the Associations' objections. *See NRECA*, 276 F.3d at 619.

[8] The Associations had argued to the Court that "[t]he companies' promise to devise an alternative method of interconnecting their systems if they opt not to renew the contract path . . . is inadequate." *Id.*

Officer in this proceeding, and the Court's decision shows that the issue has already been considered and resolved openly by the Court.

Second, even if this issue were in question, no basis would exist to question the accuracy of Mr. Baker's testimony that AEP has rollover rights permitting it to extend the term of the Contract Path. *See* AEP Exhibit No. 5 at 19. Section 2.2 of the FERC OATT provides, and the FERC has confirmed on many occasions, that parties with firm transmission service under the OATT have a *right* to rollover the service at the end of their initial contract term. *See, e.g.*, FERC OATT § 2.2; *Southwest Power Pool, Inc.*, 103 FERC ¶ 61,293, at P 10 (2003) (rollover is a "right to continue to take transmission service"); *Sithe Power Marketing, L.P., Exelon Generation Company, LLC v. ISO New England, Inc.*, 101 FERC ¶ 61,149, at P 16 (2002) ("The Commission has consistently held that under the Commission's pro forma OATT . . . , all firm transmission customers . . . have a right to continue to take transmission service from their existing transmission provider. . . ."); *Pub. Serv. Co. of New Mexico*, 82 FERC ¶ 61,127, at 61,456 (1998) (rollover right is "fundamental" provision of Order No. 888), *order on reh'g*, 85 FERC ¶ 61,240, at 62,005 (1998) ("Order No. 888-A provides the customer with an *automatic entitlement* to a right of first refusal.") (emphasis added). This rollover right gives AEP priority over any other potential customer that wants to use the same transmission capacity. FERC OATT § 2.2; *see also, e.g., Entergy Power Marketing Corp. v. Southwest Power Pool, Inc.*, 91 FERC ¶ 61,276, at 61,936 (2000) ("The intent of Section 2.2 is to *provide the existing long-term firm customer a priority* over competing requests . . . .") (emphasis added); *Sithe*, 101 FERC ¶ 61,149 at P 16 ("This rollover right . . . was intended to apply regardless of whether there is a competing request for transmission service."). Since AEP is paying the applicable tariff rate for this transmission service, all that AEP has to do to exercise its rollover right is provide notice at

least sixty days before its current contract ends and agree to match the term of service of any competing request for service. FERC OATT § 2.2; *see also, e.g.*, *Entergy Power*, 91 FERC ¶ at 61,936; *Pub. Serv. Co. of New Mexico v. Arizona Pub. Serv. Co.*, 103 FERC ¶ 61,111, at PP 18-21 (2003). AEP disagrees with the Associations' recitation (Br. at 25-26) of potential challenges that AEP faces in renewing the Contract Path. Such challenges are not based on any record evidence and are effectively refuted by the fact that AEP has used and renewed the Contract Path since the Merger without any difficulty. The Associations' challenges are therefore not entitled to any weight.

6. The Associations misrepresent Mr. Baker's testimony to suggest that no transmission service will be available to interconnect the Combined System for five of the twenty-four months after June 1, 2005. *See* Associations' Br. at 30. Mr. Baker's testimony was that *monthly* non-firm service is often not available, because transmission providers typically are conservative in stating the amount of transmission capacity that can be purchased as longer term service, in order to ensure that they have enough capacity to meet contingencies, such as generator outages. *See* AEP Exhibit No. 5 at 17-18. However, Mr. Baker's testimony clearly explained that reliance on shorter term transmission services, particularly hourly and daily non-firm service, is often a better strategy than trying to make longer term (*i.e.*, monthly) reservations, because more capacity is made available by providers for shorter term transactions. Mr. Baker also testified that the shorter term services have been available: "[I]t is typical that daily service would be available even in future months when no available monthly capacity is projected.". *Id.* at 17; *see also id.* at 17-18. The Associations have turned this testimony upside down. They also have failed to present any evidence calling into question the correctness of Mr. Baker's conclusions, so their suppositions are, again, entitled to no weight.

7. The Associations present an argument, without citation to any evidence, that the Combined System fails to satisfy the interconnection requirement because the AEP east and west zones are in "non-contiguous" RTOs. Associations' Br. at 31-32. The issue before the Hearing Officer, however, is whether the Contract Path is unidirectional, not whether the east and west zones are contiguous (or any other variation on the argument that the Contract Path is too "tentative"—arguments the Court has already rejected). In any event, the Associations did not present evidence explaining why it might be insufficient under the Act to purchase transmission service from an intervening RTO, as opposed to relying on a contract between two contiguous RTOs, and AEP cannot understand why it would be.

Indeed, the relevant evidence in the record negates the Associations' claim. Mr. Baker testified that the establishment of MISO as the operator of transmission facilities on the intervening Contract Path enhances the Path's reliability, because the RTO has access to a broader array of transmission facilities than did Ameren as an individual transmission provider. AEP Exhibit No. 5 at 18-19. There is no basis in the record for challenging Mr. Baker's logical conclusion—one that is amply supported by his expert observation and long practical experience in the industry.

8. The Associations claim that the Court "held that AEP and CSW are 'distant utilities.'" Associations' Br. at 33. AEP has been unable to find such a holding. The Court merely ruled that the Commission had failed to distinguish prior cases in which it had suggested that distant utilities cannot be interconnected by a contract path. The Commission is free on remand to define "distant" in light of current industry circumstances and technology, or to explain why this dicta from certain of its earlier decisions no longer reflects its current policy.

9. The Associations claim that the hearing in this case has provided "no factual basis" for the Commission to change its policy regarding the interconnection of distant utilities. Associations' Br. at 33. Assuming *arguendo*, that the Commission had such a prior policy (a contention that AEP disputes based on the totality of the case law), the record in this case includes substantial, unrebutted evidence confirming the correctness of the Commission's decision in several recent cases to permit the use of contract paths to interconnect utilities separated by long distances, whether or not the Commission's current policy is viewed as an abandonment of a prior policy. The relevant evidence is set forth and explained in AEP's Initial Brief. *See* AEP Initial Br. at 14-15. No contrary evidence is in the record.

Accordingly, the Associations have not shown that AEP fails to satisfy the Act's interconnection requirement.

C. The Single Area or Region Requirement (Associations' Brief at 35-52)

1. The Associations contend that the Commission must apply the same factors and use the same type of evidence that it used in its 1944-45 *Middle West Corp.* and 1964 *American Natural Gas Co.* decisions in order to find that AEP satisfies the single area or region requirement of the Act. *See* Associations' Br. at 36-38. The Associations are wrong. The relevant case law is clear that, if they are to safeguard Congress' legislative goals, agencies must be able to "adapt their rules and practices to the Nation's needs in a volatile, and changing economy." *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967). The D.C. Circuit has explained: "If an agency is to function effectively, . . . it must have some opportunity to amend its rules and regulations in light of its experience." *Florida Cellular Mobil Comm. Corp. v. FCC*, 28 F.3d 191, 196 (D.C. Cir. 1994); *see also Stowell v. Secretary of Health & Human Servs.*, 3 F.3d 539, 543 (1st Cir. 1993) ("Agencies 'must be given ample latitude to adapt [their] rules and policies to the demands of changing circumstances.'") (citation omitted).

Accordingly, "the *Chevron* doctrine contemplates that agencies can and will abandon existing policies and substitute new approaches." *Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1379 (Fed. Cir. 2004); *see also SKF USA, Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) ("[Agencies] must be allowed to assess 'the wisdom of [their] policy on a continuing basis.'" (citation omitted)).

Courts have consistently held that *Chevron* deference applies to agency interpretations of their statutory provisions—even when an interpretation is made "more than 100 years after the enactment." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740 (1996). The Supreme Court "has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984)). "[A]n administrative agency's entitlement to deference is not limited to its initial interpretation of a statute." *Strickland v. Comm'r, Maine Dep't of Human Servs.*, 48 F.3d 12, 18 (1st Cir. 1995).[9] Indeed, agencies enjoy *Chevron* deference not "because of a presumption that they drafted the provisions in question, or were present at the hearings . . . , but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved . . . by the agency." *Smiley*, 517 U.S. at 740-41.

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[9] *See also, e.g., Nat'l Home Equity Mortg. Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355, 1360 (D.C. Cir. 2004) ("An agency's interpretation of a statute is entitled to no less deference . . . simply because it has changed over time"); *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000) ("An agency is free to change the meaning it attaches to ambiguous statutory language, and the new interpretation may still be accorded *Chevron* deference."); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 452 (8th Cir. 1997) (same); *Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993) (same).

Thus, in *Chevron* itself, the Supreme Court ruled that the EPA was allowed to shift its interpretation of the term "source" under the Clean Air Act in order to properly implement congressional policy "in a technical and complex arena." 467 U.S. at 863. "The fact that the agency has from time to time changed its interpretation of the term 'source' does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute. . . . On the contrary, . . . the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible . . . ." *Id.* at 863-64.

Likewise, in *American Trucking*, the Supreme Court recognized the Interstate Commerce Commission's need to modify its regulations in response to changes in the trucking industry. 387 U.S. at 404. In affirming the ICC's change of position, the Supreme Court dismissed the argument that the agency was bound to its prior interpretation of the statute: "[F]aced with new developments or in light of reconsideration of the relevant facts and its mandate, [the Commission] may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, . . . *this kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency.*" *Id.* at 416 (emphasis added). *Accord EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 205 (4th Cir. 2005) ("[A]gencies should remain free to administer their organic statutes to meet the regulatory needs of changing conditions"); *see also Peoples Fed. Sav. & Loan Ass'n v. Comm'r of Internal Revenue*, 948 F.2d 289, 303 (6th Cir. 1991) (changed agency interpretation made, in part, based on evolving economic considerations deserved deference); *Nat'l Home Equity Mortgage Ass'n*, 373 F.3d at 1360 (permissible for agency to modify interpretation of statutory provision twice within five years, because first modification caused an "unanticipated and undesirable fallout" of predatory lending practices, in contravention of congressional goals); *United States Air Tour Ass'n v. FAA*,

298 F.3d 997, 1007 (D.C. Cir. 2002) (agency may change interpretation of how it determines whether "natural quiet" is disturbed in national park based on "more data" and "additional research"); *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003) (Army Corps of Engineers reasonably changed interpretation of "navigable" waters under Section 404 of Clean Water Act to include tributaries based on its "understanding of the best way to [implement] the CWA . . . [o]ver the years").

So too here: It would be wholly improper for the Commission to ignore the enormous changes that have taken place in the electric industry when interpreting a provision of the Act for the first time in several decades. Indeed, although the Associations' position is that the Commission's interpretation of Section 2(a)(29)(A) was etched in stone in the middle of the last century, the Commission is not so constrained. Recent United States Supreme Court precedent interpreting the jurisdictional provisions of the Federal Power Act, the sister statute of the Public Utility Holding Company Act, both passed in 1935, confirms the Commission's discretion here. In *New York v. FERC*, 535 U.S. 1 (2002), the Supreme Court held that the Federal Power Act had to be interpreted in light of current industry conditions rather than the conditions that prevailed at the time the statute was enacted:

> Since 1935, and especially beginning in the 1970's and 1980's, the number of electricity suppliers has increased dramatically. Technological advances have made it possible to generate electricity efficiently in different ways and in smaller plants. In addition, unlike the local power networks of the past, electricity is now delivered over three major networks, or "grids," in the continental United States. . . . As a result, it is now possible for power companies to transmit electric energy over long distances at a low cost. . . .
>
> Our evaluation of the extensive legislative history . . . is affected by the importance of the changes in the electricity industry that have occurred since the FPA was enacted in 1935. . . . [T]here is no evidence that if Congress had foreseen the developments to which FERC has responded, Congress would have objected to FERC's interpretation of the FPA. . . . Whether or not the 1935 Congress foresaw the dramatic changes in the

> power industry that have occurred in recent decades, we are persuaded, as was the Court of Appeals, that FERC properly construed its statutory authority.

Id. at 5, 7-8, 23.

Thus, while the Court in this case held that the Commission could not *ignore* the single area or region requirement because of changed electric industry conditions, it did not direct the agency to freeze its consideration of this standard based on circumstances that may have existed in the past. *See NRECA*, 276 F.3d at 616-19. Nothing in the Court's decision suggests that the Commission does not have discretion to interpret the Act in light of current conditions in the electric industry and the economy. Indeed, the ample case law described above confirms that, if the Court had directed the Commission to interpret the Act in accordance with no-longer relevant economic realities, its decision would have been counter to the prevailing law.

Accordingly, AEP presented substantial testimony explaining why the Commission should not be confined to those elements of fifty-year-old precedent that are limited to geophysical homogeneity in interpreting the Act's single area or region requirement in this case. AEP witnesses Johnson and Baker described the enormous changes that have taken place in the electric industry, both technologically and commercially, since the 1960s, and explained that each such change was in the direction of increased coordination, competition, and interdependence over much greater distances. AEP Exhibit No. 2, at 11-14; AEP Exhibit No. 5, at 20-37. AEP witness Harrison discussed the significant changes in the United States economy that have also increased the capability for trading over much larger distances, and greater economic interdependence over wider areas. *See* AEP Exhibit No. 1. None of this testimony was rebutted.

2. The Associations argue that Dr. Harrison's testimony is deficient because he "includes no analysis of electricity infrastructure, no analysis of electricity trading, and no analysis of

electricity markets." Associations' Br. at 38. Of course, AEP presented other witnesses to address these issues. Their suggestion is that it is, *ipso facto*, improper to define single area or region based on non-electricity factors. Nothing in the statute, its legislative history, or prior Commission decisions suggests that this is the case. In light of the absence of statutory guidance, AEP chose to present evidence analyzing the statutory single area or region requirement from both perspectives. The Company fails to understand the basis for an argument that AEP could not demonstrate that it satisfies the statutory requirement on the basis of both electric industry and broader economic criteria.

3. The Associations next claim that Dr. Harrison's definition of "region" is invalid because the Commission in 1944 considered whether the regions are "more or less typical throughout," and the Court referenced this factor. Associations' Br. at 38-39. Thus, the Associations claim that Dr. Harrison's definition of region based on functional relationships is invalid for purposes of interpreting this Section of the Act.

Dr. Harrison testified as an expert that regional economists define regions in two ways: either by reference to similarities within a region ('homogeneous regions") or by reference to patterns of trade that demonstrate economic interdependence, which he calls "functional regions." He explained:

> Functional regions are characterized by economic interdependence. This economic interdependence includes movements of goods and services and other measures of transactions within the region. Economic interdependence is also reflected in the degree to which prices are correlated.

AEP Exhibit No. 1 at 4. Dr. Harrison reconfirmed these points later in his testimony, concluding that it is appropriate based on the circumstances here to define the area or regions where the Combined System is located based on functional characteristics. *Id.* at 41-42. He then explained

why, based on his expertise, it is not necessary or appropriate in this case to define single area or region based exclusively on the characteristic of "homogeneity." *Id.* at 42.

Dr. Harrison is indisputably an expert in this area, and no party has attempted to suggest otherwise. No participant presented testimony from an opposing expert, or other evidence of any kind, suggesting that Dr. Harrison's definition of area or region based on functional characteristics, as opposed to homogeneity, is not a valid one from an economic or any other perspective. Nor has anyone presented testimony challenging the technical accuracy of Dr. Harrison's conclusion that the Combined System is contained within one region based on functional characteristics. Accordingly, most of the Associations' arguments consist of unsupported assertions that have no basis in the record.

The Associations concede this deficiency: "It is true, of course, that areas with geographic, geologic, and economic differences may nevertheless be determined to be within a single area or region." Associations' Br. at 40. But, they then claim that "Dr Harrison's analysis of functional regions, although perhaps useful for purposes of general economic analysis, sheds no light upon the meaning of the 'region' requirement of section 2(a)(29)(A)." The Associations have no basis for making this latter assertion. In fact, in the 1964 *American Natural Gas* decision, the Commission referenced functional characteristics to define a region. *See* AEP Initial Br. at n.27 (noting that *American Natural Gas* recognized functional factors such as "industrial, marketing and general business activity [and] transportation facilities"). And, whether the Commission focused on functional characteristics to define a region forty years ago is irrelevant, since the statute does not define "area or region" and Congress thus left the Commission with discretion to interpret this statutory requirement.

4. The Associations mischaracterize Dr. Harrison's cross-examination testimony by stating that he "was forced to concede" that AEP can be found to be in one area or region only if "one defines the entire Eastern United States as a single region." Associations' Br. at 41. Dr. Harrison neither made nor implied any such concession. The quoted cross-examination answer was in response to a question concerning the geographic area where *natural gas trading* takes place in the eastern United States. Dr. Harrison never suggested that the "area or region" requirement should be defined by reference solely to trade patterns for this one commodity, nor did he ever suggest that his answer regarding natural gas trades was a concession of any kind.

In addition to mischaracterizing Dr. Harrison's testimony, the Associations' argument here presumes a prohibition against large regions that has no basis in the statute. The "not so large," or size, limitation in Section 2(a)(29) is very clear. It applies to the fourth requirement of integration (the "localization requirement") and controls the size of the utility *system*—not *the area or region* in which the utility is situated. This is evident in the Court's summary of Section 2(a)(29):

> The Commission has broken this language down into four separate prerequisites for approval of a proposed acquisition: . . . (3) the system itself must be confined to a "single area or region" (the region requirement); and (4) the system "must not be so large as to impair . . . the advantages of localized management, efficient operation, and the effectiveness of regulation" (the localization requirement).

NRECA, 276 F.3d at 611 (citations omitted). The statute reflects no bias against a large region. Rather, the region requirement turns on the existence of a reasonably identified region and the merged system being located within that region. AEP has introduced substantial evidence establishing both of these points. The Associations' Brief is simply a distortion of the record.[10]

[10] The Associations also claim that "it appears that, other than Dr. Harrison himself, the only person who believes that the merged AEP is confined to single area or region is AEP's other witness on the question, Mr. Baker." Associations' Br. at 42. Of course, there is a good

5. The Associations contend that Mr. Baker's conclusion that the Eastern Interconnection can be defined as a single area or region is inconsistent with the holding of the Court, because it "conflates" the region requirement with the interconnection and coordination requirements of the Act. Associations' Br. at 42. However, the Court never suggested that the Commission could not base its finding of what constitutes a single area or region on current industry circumstances or conditions, including enhanced interconnection and coordination. It merely held that the Commission cannot rely on these changes in the industry to ignore this statutory requirement altogether. *NRECA*, 276 F.3d at 617-19. Consistent with the Court's decision, Mr. Baker presented testimony concerning the current technological and commercial circumstances in the electric industry to provide a factual basis for *defining* the single area or region requirement in a relevant manner in the year 2005. He describes the industry as it currently exists, and then uses his description to draw conclusions, based on his expertise in the industry, about how the Commission ought to define "single area or region" in this case. The Commission set this case for hearing to elicit a factual basis for making an appropriate finding on the single area or region requirement, and Mr. Baker's testimony provides it.

6. The Associations use approximately six pages of their brief to present their counsel's views on the correctness of Mr. Baker's testimony concerning the impact of various FERC initiatives and technological changes on the electric industry. Associations' Br. at 43-48. They describe Mr. Baker's testimony, among other things, as "overly optimistic" and "wishful thinking." *Id.* at 43, 48.

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reason for this: these two witnesses, along with AEP witness Johnson, are the only witnesses who provided testimony on this subject. Accordingly, the Associations' statement is correct, and damning, insofar as it refers to the evidentiary record.

AEP, of course, disagrees with these various characterizations, all of which are merely the opinions of counsel. But more importantly, AEP's views on the state of the industry and the electric markets are based on the testimony of their witnesses. The Associations' rebuttal is based on nothing but the views of counsel interspersed with selected snippets from FERC cases that are cobbled together with counsel's extra-record assertions to achieve the appearance of expert conclusions. The opportunity for the Associations to present the factual evidence that the Court of Appeals found to be lacking in the Commission's prior decision has come and gone, and the Associations presented nothing.

7. The Associations mischaracterize Mr. Baker's testimony by stating that he "admits AEP engages in separate trading within three separate hubs," and that he "admitted that prices are not uniform across the hubs," implying that Mr. Baker's statement's were concessions grudgingly made during cross-examination. Associations' Br. at 47. This is simply not true. The quoted testimony is from Mr. Baker's direct testimony. *See* AEP Exhibit No. 5 at 33-34. Moreover, the excerpts quoted by the Associations were taken out of context. This testimony clearly explains how the Combined AEP System operates in the *same* wholesale power market. As Mr. Baker testified: "The Hubs are different locations in this market that bring buyers and sellers of wholesale power together. All of the utility participants in these Hubs are either directly or indirectly linked through a common transmission infrastructure." *Id.*[11] Thus, the "admissions"

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[11] Mr. Baker further testified:

> Q. Does the fact that the wholesale prices in the respective ERCOT, Entergy, and Cinergy Hub are often at different levels affect your conclusion that this is one broad wholesale electricity market?
>
> A. No. The situation in this broad market is really analogous to what has occurred in PJM over the years. The centrally administered PJM market consists of numerous "nodes." A market clearing price is established from each node for each time period. When these prices separate, it is related to

the Associations claim are actually part of a larger description of the wholesale electricity market that only supports approval of the Merger as consistent with the Act. The Associations had an opportunity both to present evidence on this issue and to cross-examine Mr. Baker on his description of the wholesale power market. They did neither.

Similarly, the Associations' imply that Mr. Baker's testimony regarding pricing differences between the Hubs equates to a lack of pricing correlation that is inconsistent with Dr. Harrison's description of a functional region as being "reflected in the degree to which prices are correlated." Associations' Br. at 47-48. This also is rooted on a distortion of Mr. Baker's testimony. Mr. Baker neither stated nor implied that there is a lack of wholesale power price correlation across the Hubs. Rather, his definition of the market and his description of how it operates demonstrate the inevitable correlation of wholesale power prices in this market. Dr. Harrison never suggested that price correlation cannot contemplate different price levels. Again, had the Associations wished to put in evidence on price correlation, or to explore the issue on cross-examination, they had the opportunity to do so but chose not to.

8. The Associations contend that AEP witnesses Harrison and Baker provided inconsistent testimony, because Dr. Harrison analyzed trade flows among different commodities to reach his conclusions, and Mr. Baker relied on his knowledge of the electric industry without performing the same analysis as Dr. Harrison. The two witnesses simply approached their testimony differently. There is nothing wrong with this. Dr. Harrison is a regional economist, and he analyzed the issue in the manner of an economist by evaluating economic data. Mr. Baker analyzed the issue from the perspective of a long-term participant in the electric utility markets

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> transmission constraints. Given a transmission system of infinite capacity, one would expect these prices to converge.

AEP Exhibit No. 5 at 33-34.

and as an expert on the electric power industry. The two approaches are different, but they are in no way inconsistent. Each witness presented the evidence most relevant to the issue from his own perspective and expertise, and each drew valid and appropriate conclusions from the evidence he presented.

9. The Associations cite an AEP witness on competition issues in the FERC proceeding on approval of the Merger, who presented testimony in 1999 that, historically, the AEP and CSW systems did not trade substantially with each other, and predicting that changes in industry conditions such as open access transmission would not increase the level of trading between these Companies. Associations' Br. at 50-51.

The referenced testimony is irrelevant to the single area or region requirement. This testimony, partly retrospective and partly predictive, is approximately six years old and refers to evidence from 1997—eight years ago. The Commission's decision ordering this hearing, however, made specific allowance for the perceived need of "parties to this proceeding . . . to introduce facts regarding the *current* state of the utility industry." *Hearing Order*, 2004 SEC LEXIS 1952 at *4 (emphasis added). AEP availed itself of that opportunity and introduced evidence of the consistent amount of energy transferred between the two zones of the Combined System, as well as Mr. Baker's testimony regarding the development of a robust wholesale power market in the Entergy, Cinergy, and PJM Hubs. The Associations neither rebutted this testimony nor challenged it on cross-examination. Their effort to address it for the first time on brief by invoking extra-record evidence is neither appropriate nor persuasive.

Moreover, this testimony was not placed into the evidentiary record in this hearing, and AEP did not have an opportunity to respond to it. Indeed, even assuming that this prior testimony could be considered part of the administrative record on remand because it was

submitted with AEP's original application, the Presiding Judge was clear that all parties were under an obligation to identify any such evidence they intended to rely upon in this case, thus providing other parties an opportunity to respond. *See* Prehearing Conf. Tr. 8-9 (Jan. 5, 2005). Due process, of course, requires that AEP be given a chance to confront and respond to evidence that will be used against it, and this was not done here.

10. The Associations claim that Mr. Baker's proposed definition of single area or region based on the Commission's (and FERC's) definition of region for purposes of a merger competition analysis is flawed because the FERC has abandoned this definition of market area in favor of a "delivered price test" for purposes of its own competition analysis. Associations' Br. at 52. The Associations are wrong. The FERC now uses a "delivered price" test to evaluate the *impact* of a merger on electric markets, but its definition of the relevant market region in which to evaluate this impact is still based on the "first tier" interconnected utility standard. *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. & Regs. ¶ 31,044, at 30,124 (1996), *order on reconsideration*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997).

III. REPLY TO THE INITIAL BRIEF OF PUBLIC CITIZEN

AEP's reply to the Initial Brief of Public Citizen is divided into three parts. In part one, AEP will respond to Public Citizen's newly-revealed contention that this proceeding is not limited to the two issues that the Commission set for hearing based on the Court's decision. In part two, AEP will respond to Public Citizen's contention that AEP has failed to show that it is interconnected and can operate as a single system. In part three, AEP will respond to Public Citizen's arguments that the Combined system is not located in a single area or region.

A. Scope of Proceeding (Public Citizen's Brief at 17-19)

Public Citizen contends that, because the Court of Appeals vacated the Commission's prior decision approving the Merger, this case on remand must include a *de novo* review of the entirety of the statutory standards for obtaining approval of the Merger under the Act. Public Citizen cites no precedent to support this extraordinary proposition.

AEP has not identified any federal administrative law decision that holds an agency must reconsider *de novo* all of the required statutory findings, including those affirmed by the Court, when a court vacates and remands a decision because of particular inadequacies in the prior decision. In fact, this proposed construction of the law would effectively invalidate the "mandate" rule, which governs appellate review of agency action. Under the mandate rule, the scope of review on remand is limited to the Court's findings of improper agency actions—the agency must address only what the Court found to be insufficient or unlawful. *E.g.*, *City of Cleveland v. FPC*, 561 F.2d 344, 348 (D.C. Cir. 1977). Any issue decided by the Court, "expressly or by . . . implication," is the law of the case and cannot be challenged in the same proceeding. *Id.*; *see also Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C. Cir. 1983).

Moreover, as explained above in Part I.A.4, the Court's decision to vacate the original Commission order has no bearing on the Commission's ability to reassess its interconnection and single region findings in light of the new evidence. The law is that the Commission has full discretion to "'develop a convincing rationale for re-adopting'" its approval of the Merger on remand. *Radio Television*, 130 F.3d at 1083 (citation omitted).

In any case, the Hearing Officer in this case is bound by the terms of the Commission's order setting this case for hearing. *See* 17 C.F.R. §§ 201.200(b), 200(c)(2). The Commission, in its August 30, 2004 Order, properly exercised its discretion by expressly limiting this proceeding to the two issues left unresolved by the Court of Appeals, and until Public Citizen filed its Initial

Brief, all parties complied with this limitation. Thus, if there is an allegation that the Commission erred in setting this case for hearing, that matter should have been taken up with the Commission long ago, and it is too late to do so now.[12]

For each of these reasons, the Hearing Officer and the Commission need not "review anew the totality of the question of whether AEP has met its burden of proving that its acquisition of CSW is legal under Section 11 of PUHCA." Public Citizen Br. at 19

B. The Interconnection Requirement (Public Citizen's Brief at 19-27)

1. Most of Public Citizen's argument in this section of its brief is directed to the issue of whether the 250 MW Contract Path acquired by AEP was sufficiently large to satisfy the integration requirements of the Act. The Commission did not set this issue for hearing, and indeed it could not have because it has already been finally decided for purposes of this proceeding. As discussed earlier in this Brief, the Court of Appeals directly addressed this issue and found that the 250 MW Contract Path is sufficiently large. *NRECA*, 276 F.3d at 614-15. Since the Court has decided this issue, the Court's findings are the law of the case and not subject to challenge on remand. *City of Cleveland*, 561 F.2d at 348. It is worth noting, as well, that Public Citizen did not raise this issue in its Statement of Position filed on November 30, 2004, as required by the procedural order in this proceeding. Accordingly, AEP was never put on notice that Public Citizen even contended that the issue was in the case, so it could address the dispute on a timely basis.

[12] Indeed, Public Citizen should be estopped from raising additional issues at this time because it did not challenge the scope of the Commission's hearing order on a timely basis, did not identify its disagreement with the hearing order in its intervention papers, and did not present (or even hint at) its position on this issue in its Statement of Position as required by the procedural schedule. The ineluctable consequence of Public Citizen's tactics is that no party had an opportunity to address this issue of the scope of the hearing with the Hearing Officer and/or the Commission on a timely basis before spending their time and resources to complete the hearing.

2. Public Citizen intersperses a short argument that AEP cannot rely on non-firm transmission service to achieve interconnection, because non-firm service is too tenuous. Public Citizen Br. at 21-22. The argument in this portion of its Brief consists almost entirely of the opinions of counsel. On the other hand AEP presented a witness, Mr. Baker, with several decades of experience in the electric industry, including substantial experience operating under FERC Order No. 888, who testified otherwise. Moreover, the Commission has ruled in several recent cases that use of non-firm service in at least one direction is sufficient in light of the FERC's open transmission access regime. *See* AEP Initial Br. at 11 (discussing *CP&L Energy, Inc.*, *Energy East Corp.*, *Exelon Corp.*, *New Century Energies*). The only contrary testimony in the record is Mr. Casazza's unexplained and unsupported statement that non-firm service can never be used to integrate two utilities. *See* Public Citizen Exhibit No. 1 at 8. Mr. Casazza provided no information about the AEP system on which to base this assertion, and there is no indication in his resume that he has any experience operating under FERC Order No. 888. *See* Public Citizen Br., Att. J. His statement amounts to an *ipse dixit* and is entitled to little or no weight.

3. Public Citizen argues, based on Mr. Casazza's testimony, that use of the Contract Path "increases the probability" that constraints will be created elsewhere on the system. Public Citizen Br. at 24. The issue of whether AEP's use of the Contract Path may create constraints on other systems was not remanded by the Court nor set for hearing by the Commission. The issue does not even appear to be relevant to a finding that the Merger satisfies Section 11 of the Act. Moreover, even if it could be relevant, AEP did not have an opportunity to address it, because Public Citizen provided no notice that it intended to raise the issue, despite the limitations of the Hearing Order. In any case, Mr. Casazza did not testify that there would be any such impacts,

only that there *could* be. No third party has intervened in this case alleging it has been impacted, and there is no evidence in the record that any such impacts have occurred. Public Citizen's speculations should therefore be dismissed as entirely speculative.

4. Public Citizen contends that AEP has not demonstrated a right to rollover the Contract Path when the current FERC OATT agreement expires. AEP has addressed this issue in full in response to the Associations' Brief. *See supra* Part I.B.5. None of Public Citizen's statements about the nature of rollover rights reflects an understanding of this aspect of FERC's open access rules or the fact that AEP has already successfully renewed the term of the Contract Path since the Merger. *See* AEP Exhibit No. 5 at 15.

5. Finally, Public Citizen contends that the Division of Investment Management may be confused about the difference between electric capacity and energy. Public Citizen Br. at 25-26. Counsel then proceeds to provide two pages of explanations on this subject. None of this explanation is either in the record or relevant to any issue in the case.

C. Single Area or Region Requirement (Public Citizen's Brief at 27-32)

Public Citizen contends that the testimony of AEP witness Dr. Harrison is all irrelevant because electricity is a "service," not a "product," and that electricity cannot be stored. Public Citizen Br. at 27. None of the statements on which Public Citizen relies is in the record. However, Public Citizen contends that these "facts" demonstrate that Dr. Harrison's testimony is wrong because (1) his testimony allegedly tries to compare electricity to other products and services in the economy, and (2) he does not address whether AEP operates in an area so large as to impair effective management, efficient operation, and effective regulation. *Id.*

As to the first point, Dr. Harrison did not attempt to compare electricity to other products and services discussed in his testimony. The purpose of his testimony was to demonstrate that

AEP operates in a single functional area or region based on commodity flows and interactions in the economy generally.

As to the second point, the Commission has already found that the Combined System is "not so large as to impair . . . the advantages of localized management, efficient operation, and the effectiveness of regulation" as Section 2(a)(29)(A) of the Act requires. *American Electric Power Co.*, Holding Co. Act Release No. 27186, 54 S.E.C. 697, 718 (June 14, 2000). That finding was not appealed and is now final. Moreover, even if the issue were still alive and within the scope of the Hearing Order, Public Citizen did not provide any evidence that AEP does not satisfy this standard of the Act.[13]

[13] Public Citizen also alleges that William O. Douglas, the Commission's third Chairman, would not have allowed the Merger to proceed, referencing statements in his 1938 report to Congress on the early implications of the Act. Public Citizen Br. at 28. Of course, this Commission—not a past one—is deciding this case in light of the current facts properly introduced into the record. For the same reason, AEP declines to address Public Citizen's discussion of the dangers of PUHCA repeal or reliance on FERC merger reviews to protect consumers. These matters are not in issue.

IV. CONCLUSION

For the foregoing reasons, the Associations and Public Citizen have not presented reasonable grounds for rejecting the testimony of AEP's witnesses, which testimony demonstrates that AEP has acquired an adequate, bidirectional contract path to meet the Act's interconnection requirement, and that AEP operates in a single area or region of the country.

Respectfully submitted,

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